

**IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE**

STATE OF TENNESSEE,
Petitioner,

v.

WALGREEN CO., an Illinois corporation

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

This Assurance of Voluntary Compliance ("Assurance") is given by WALGREEN CO. a corporation of Deerfield, Illinois ("Respondent" or "Walgreen"), to PAUL G. SUMMERS, Attorney General and Reporter for the State of Tennessee ("Attorney General") and MARK WILLIAMS, Director of the Division of Consumer Affairs of the Department of Commerce and Insurance ("Division").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division and the Attorney General conducted an investigation of specific business practices of Walgreen. These practices included allegedly submitting and causing to be submitted false or fraudulent claims and requests for payment to consumers, the State of Tennessee, third-party payers and other persons, as defined in Tenn. Code Ann. § 47-18-103(7), for payment by submitting claims or requests for payment for the value of full prescriptions but only furnishing a portion of the prescribed medication to the person or consumer. As a result of the investigation, the Division and the Attorney General determined that certain acts and practices of Walgreen violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 *et seq.* (the "Act").

B. Walgreen denies any wrongdoing. Further, pursuant to Tenn. Code Ann. § 47-18-107(c), acceptance of this Assurance by Walgreen shall not be considered an admission of a prior violation of the Act. Walgreen waives the original ten (10) day notice pursuant to Tenn. Code Ann. § 47-18-108(a)(2) as to matters occurring prior to entry of this Assurance. Nothing in this assurance or any obligation related thereto shall constitute an admission by Walgreen that it had violated or breached any act, law, regulation, obligation or contract.

C. Therefore, pursuant to Tenn. Code Ann. § 47-18-107, Walgreen desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the expense of litigation.

D. This Assurance is part of a settlement of the issues addressed herein which includes a separate written Settlement Agreement between the State of Tennessee and Walgreen Co., an Agreed Order of Intervention and Dismissal in the case *State of Tennessee ex rel. Louis H. Mueller v. Walgreen Corporation* No. 96C849 a relator's share agreement between the State of Tennessee, Walgreen Co., Louis H. Mueller, relator, and his attorneys.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Walgreen gives, the Attorney General and the Division accept, and the Court approves the following assurances:

I. JURISDICTION

1.1 Upon approval of this Court, the parties agree that this matter should be assigned to the First Circuit Court, Judge Hamilton Gayden, because it has matters substantially connected to *State of Tennessee ex rel. Louis H. Mueller v. Walgreen Corporation*, No. 96C849 ("Lawsuit") assigned to that Part. The parties represent to this Court that for reasons of judicial economy this matter should be assigned to the same court as the qui tam lawsuit involving similar factual allegations upon approval of the Court.

1.2 Jurisdiction of this Court over the subject matter herein and over Walgreen for the purposes of entering into and enforcing this Assurance is admitted. Jurisdiction is retained by this Court for the purpose of enabling the Parties to apply for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. Walgreen shall pay all court costs and reasonable attorneys' fees and any costs associated with any successful petitions to enforce any provision of this Assurance and the Agreed Order which has been simultaneously submitted to the Court in this matter against Walgreen.

II. VENUE

2.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Circuit Court of Davidson County, Tennessee.

III. PERMANENT INJUNCTION

Accordingly, it is hereby agreed that upon approval of the Court, Walgreen shall be permanently and forever enjoined and bound to conduct its business within the State of Tennessee in accordance with the following practices set forth herein:

3.1 Walgreen shall fully comply with all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 *et seq.*, including but not limited to §§ 47-18-104(a) and (b)(27), which prohibit unfair and deceptive acts and practices.

3.2 In handling partially filled prescriptions, Walgreen shall demand or accept payment(s) for only the portion of the prescribed medication that is actually immediately available for delivery to a person regardless of whether that demand or acceptance is made directly or indirectly from any person.

3.3 In handling partially filled prescriptions, Walgreen shall in all representations whether made directly or indirectly, accurately represent the availability or accessible quantity of a prescription medication to any person seeking to fill a prescription.

3.4 In handling partially filled prescriptions, Walgreen shall be required to affirmatively (a) inform any person that less medication than the amount prescribed is actually provided in the initial delivery of the partially filled prescription, and (b) instruct the person of the need to obtain an additional amount of the medication in order to comply with his/her physician's care instructions.

3.5 When obtaining information from consumers, Walgreen shall be required to do so in a truthful, accurate, fair, non-deceptive and non-misleading manner. Without limiting the scope of this section, Walgreen shall ensure that any logs or other documents that consumers are required to sign indicating the quantity of prescription received are truthful, accurate, fair, non-deceptive and non-misleading.

3.6 If Walgreen directly or indirectly makes any representation(s) to consumer(s) that a transaction confers or involves rights, remedies or obligations, Walgreen shall do so in full compliance with Tenn. Code Ann. § 47-18-104(b)(12).

3.7 In dealing with partially-filled prescriptions, if Walgreen directly or indirectly makes representations to consumers that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities, Walgreen shall do so in full compliance with Tenn. Code Ann. § 47-18-104(b)(5). Any representation made by a manufacturer, wholesaler or supplier not controlled or owned by Walgreen shall not be considered a representation made by Walgreen for purposes of this paragraph.

3.8 Walgreen shall be required to review any pharmacy employee's records if Respondent receives two or more reliable complaints or other information indicating that a pharmacy employee has made any misrepresentation to a consumer, or otherwise violated any provision of this Assurance. Respondent shall promptly discipline pharmacy employees for such employee misconduct and review prescriptions dispensed by that employee to ensure that no violations of this Assurance occurred. Further Respondent

shall report any such findings to the Attorney General within ten (10) days of discovery if the conduct occurred within the State of Tennessee.

3.9 In order to ensure that Walgreen pharmacy employees are fully informed about Walgreen responsibilities under this Assurance, Walgreen shall conduct a training session and provide a written or computerized training manual or program regarding the requirements of this Assurance for Respondent's employees and/or representatives who are responsible for and/or involved with the dispensing of prescriptions in the State of Tennessee. The training shall include information designed to educate all such employees about the requirements of this Assurance. These training sessions shall also include information regarding Respondent's policy prohibiting the billing of consumers, third party payers or governmental payers for a portion of any prescription not actually immediately available for delivery. Within ninety (90) days of the company wide institution of the billing changes required by the Corporate Integrity Agreement by and between Respondent and the Department of Health and Human Services dated September 14, 1999, Respondent shall provide to the Attorney General a copy of the training manual or program regarding partial fills provided to its employees and an affidavit stating and certifying that the manual has been provided to all employees responsible for and/or involved in the dispensing of prescriptions to consumers in Tennessee along with a copy of Respondent's procedure for ensuring that all new employees receive the training manual prior to engaging in dispensing prescriptions on behalf of the Respondent. The Attorney General shall have the right, upon written request providing at least fourteen (14) calendar days notice, to review the training program or manual actually in use at one or more Walgreen stores in the State of Tennessee.

3.10 Walgreen shall provide notice of the provisions of this Assurance to its Board of Directors and to its current pharmacists and billing employees employed in Tennessee. The notice may be a summary of the Business Practices section of this Assurance. For the pharmacists, the notice may be included within the training session or manual. Walgreen shall ensure that it has a method in place for all new Walgreen pharmacists and billing employees in Tennessee to receive notice prior to filling prescriptions for Walgreen.

3.11 Within ninety (90) days of entry of this Assurance, Walgreen shall (so long as required by law, regulation, rule or other judicial order including a judicial order requiring the state of Tennessee to require posting) post the notice attached as Exhibit A in a clear and conspicuous location in the pharmacy area of each of its Tennessee stores where persons attempting to pick up prescriptions can easily read the notice. Walgreen shall (so long as required by law, regulation, rule or other judicial order including a judicial order requiring the state of Tennessee to require the posting) also post in the same fashion any updated versions of Exhibit A within ninety (90) days of receiving such updates. The notice shall be of the same size as that provided by the State of Tennessee to Walgreen.

IV. PAYMENTS TO THE STATE

4.1 Pursuant to an Agreement between Walgreen and the United States and certain Departments thereof dated September 14, 1999, Walgreen is required to pay the amount of Seven Million Six Hundred

Thousand Dollars and 00/100 Cents (\$7,600,000.00) to the United States. Walgreen consents and acknowledges that the United States shall pay to the State of Tennessee One Hundred Seventy-Nine Thousand Three Hundred Twenty-Four Dollars and 27/100 Cents (\$179,324.27) in accordance with an agreement between the United States and the State of Tennessee. This amount shall be provided to the State of Tennessee for the following purposes:

(A) The sum of Fifty-four Thousand Four Hundred Eighty-Eight Dollars and 00/100 Cents (\$54,488.00) shall be paid to the State of Tennessee for reasonable and appropriate attorneys' fees and costs of investigation, prosecution, auditing and monitoring for compliance of this matter, which may be used for consumer protection purposes, qui tam/false claims purposes, health care fraud purposes, and unfair or deceptive trade practices purposes at the sole discretion of the Attorney General. These monies represent a non-punitive payment by Walgreen to the State of Tennessee.

(B) To resolve Walgreen's potential liability pursuant to the Tennessee Medicaid False Claims Act, Tenn. Code Ann. § 71-5-182 et seq. and the False Claims Act, 31 U.S.C. 3729 et seq. and other laws for restitution and monetary sums due the State of Tennessee for its share of Medicaid dollars over payments. The State of Tennessee General Fund shall be paid the sum of One Hundred Twenty-Four Thousand Eight Hundred Thirty-Six Dollars and 27/100 Cents (\$124,836.27) to be used for the benefit of the Bureau of TennCare. These monies represent a non-punitive payment by Walgreen to the State of Tennessee.

V. MONITORING AND COMPLIANCE

5.1 Upon request, Walgreen, subject to any properly asserted legal privilege, protection or defense, shall provide books, records and documents to the Attorney General at any time, and further, shall informally or formally under oath, provide testimony and other information to the State relating to compliance with this Assurance. Subject to any properly asserted legal privilege, protection or defense, Walgreen shall make any requested information available within two (2) weeks of the request or such other time as mutually agreeable in writing by the parties, at the Office of the Attorney General in Nashville, Tennessee or at any other location within the State of Tennessee that is mutually agreeable in writing by Walgreen and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

5.2 Walgreen and the State of Tennessee shall hold compliance meetings to confirm that Walgreen has altered or is instituting changes to alter company practices within their pharmacies to conform to this Assurance. Walgreen at its sole expense, shall provide relevant personnel and documents to the representatives of the Attorney General's office to explain informally the changes in practice that have resulted from this Assurance. Following the informal provision of information by Walgreen, the Attorney General, if not fully satisfied by the information received informally, may request and Walgreen shall provide for sworn testimony the Walgreen employee most familiar with the changes to pharmacy practices that are in place to address the problems described in the State's Petition and this Assurance.

The exact dates of the meetings and locations shall be agreed in writing by the parties within ten (10) days of entry of this Assurance. The initial compliance meeting shall take place within ninety (90) days of entry of this Assurance. The Attorney General has the right to request additional compliance meetings, to be followed by formal sworn testimony if necessary, to confirm compliance if he deems them necessary. Such additional meetings will be held within forty-five (45) days of the State's written request. The Attorney General has the right to retain experts to assist with the compliance process if the State deems it necessary.

5.3 The State of Tennessee has the right to test shop Walgreen's pharmacies for the purpose of confirming compliance with this Assurance and state law. The test shoppers are not required to disclose that they are representatives of the State of Tennessee when making contact with Walgreen. Further, the State of Tennessee may record any or all aspects of its visit(s) to Walgreen's pharmacies in audio and/or video form without notice to Walgreen.

VI. PRIVATE RIGHTS OF ACTION

6.1 Pursuant to Tenn. Code Ann. § 47-18-109, nothing in this Assurance shall be construed to affect any private right of action that a consumer or person may hold against Walgreen.

VII. PENALTY FOR FAILURE TO COMPLY

7.1 As provided in Tenn. Code Ann. § 47-18-107(c), the Attorney General has the burden of proving Walgreen's failure to comply and, if applicable, whether such failure to comply was done in a knowing manner, as defined in the statute.

7.2 Pursuant to Tenn. Code Ann. § 47-18-107(c), Walgreen understands that upon execution and filing of this Assurance, any proven subsequent failure to comply with the terms hereof is *prima facie* evidence, in any court or judicial proceeding, of a violation of the Tennessee Consumer Protection Act. The paraphrasing of the statute herein is not intended to alter the statutory language or requirements.

7.3 Pursuant to Tenn. Code Ann. § 47-18-107(f), Walgreen understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including but not limited to contempt sanctions and the imposition of attorneys' fees and civil penalties. Walgreen shall pay all court costs and reasonable attorneys' fees associated with any successful petitions to enforce this Assurance against Walgreen.

7.4 If the Attorney General determines that Walgreen has knowingly failed to comply with the terms of this Assurance and if in the Attorney General's sole discretion the knowing failure to comply does not threaten the health or safety of the citizens of the State of Tennessee, the Attorney General shall notify Walgreen of such failure to comply and Walgreen shall then have fifteen (15) calendar days from receipt of such notice to provide a good faith written response to the Attorney General's determination. The

response shall include at a minimum:

- (1) a statement that Walgreen is in full compliance with the Assurance ;
- (2) a detailed explanation of how the alleged violation(s) occurred; (
- 3) a statement that the alleged breach has been cured; or
- (4) a statement that the alleged breach cannot be reasonably cured within 10 days from receipt of notice, but (i) Walgreen has begun to take corrective action to cure the breach; (ii) Walgreen is pursuing such corrective action with due and reasonable diligence; and (iii) Walgreen has provided to the Attorney General a reasonable timetable for curing the breach.

Nothing herein shall be construed to exonerate any contempt of or failure to comply with any provision of this Injunction after the date of its entry, to compromise the authority of the Attorney General to initiate a proceeding for any contempt, or to compromise the authority of the court to punish as a contempt any violation of this Injunction. Further, except as otherwise stated in this paragraph, nothing in this subsection shall be construed to limit the authority of the Attorney General to protect the interests of the State of the people of the State of Tennessee.

7.5 At any time, Walgreen shall be permitted to come before this court and seek a declaration that its actions and business practices are in full conformity with this Assurance.

7.6 If the Attorney General determines that Walgreen has knowingly failed to comply with the terms of this Assurance and if in the Attorney General's sole discretion the knowing failure to comply threatens the health or safety of the citizens of the State of Tennessee, the Attorney General shall, to the extent required by law, notify Walgreen of such failure to comply and any contempt motion filed hereunder in accordance with the applicable rules of civil procedure.

VIII. REPRESENTATIONS AND WARRANTIES

8.1 Walgreen represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations. The parties warrant that they will implement the terms of this Assurance in good faith. Further, no offers, agreements, or inducements of any nature whatsoever have been made to Walgreen by the State of Tennessee, its attorney or any employee of the Attorney General's Office, the Department of Health, Bureau of TennCare, or the Division of Consumer Affairs to procure this Assurance. This Assurance is part of a settlement package which includes the documents described in paragraph D of the Witnesseth section, above.

8.2 Walgreen Co. represents that signatories to this Assurance have authority to act for and bind Walgreen.

8.3 Walgreen will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

8.4 Neither Walgreen nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Health, the TennCare Bureau, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of Walgreen, except as otherwise stated herein.

8.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Walgreen's advertising or other business practices, except as set forth in paragraph 8.18 of this Assurance.

8.6 Walgreen Co. warrants and represents that it is the proper party to this Assurance. Walgreen further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive, unfair or inaccurate, the State has the right to move to vacate or set aside this Assurance, and request that Walgreen be held in contempt, if the State so elects.

8.7 This Assurance may only be enforced by the Attorney General and Walgreen Co.

8.8 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

8.9 This document shall not be construed against the "drafter" because both parties participated in the drafting of this document.

8.10 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Assurance shall not bar the State or other governmental entity from enforcing laws, regulations or rules against Walgreen.

8.11 Nothing in this Assurance shall be construed to limit Walgreen's right and ability to raise any defenses to any prosecutions, investigations, lawsuits or claims.

8.12 This Assurance shall be binding and effective against Walgreen upon Walgreen's execution of the Assurance.

8.13 This Assurance (and accompanying Agreed Order) and the Settlement Agreement in *State of Tennessee, ex rel. Louis H. Mueller v. Walgreen Corporation* case no. 96C849 constitute the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition and the Relator's Complaint. This Assurance is limited to resolving only matters set forth in the State's Petition which the Attorney General could commence pursuant to the Tennessee Consumer Protection

Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.* for actions taken prior to the entry of this Assurance.

8.14 Walgreen and the Attorney General recognize that participation in the Tennessee Medicaid/TennCare program is dependant upon acceptance into a network by a Managed Care Organization ("MCO") and a Behavioral Health Organization ("BHO") and that MCOs and BHOs have discretion, so long as consistent with federal and state law, to set policies for participation in their networks. The Office of the Tennessee Attorney General will not attempt to influence any MCO or BHOS to exclude Walgreen from participation as a provider in a MCO network due to the conduct described in the paragraph A of the Witnesseth section.

8.15 The State of Tennessee and Walgreen agree that this Assurance is given as part of a compromise of claims in paragraph 8.13, is not punitive in nature, and does not constitute a criminal or administrative penalty or fine.

8.16 Walgreen acknowledges that the State of Tennessee does not have the authority to release Walgreen from any claims or actions for debarment or otherwise which may be asserted by private insurers or similar entities, such as MCOs and BHOS, that are paid on a capitated basis for providing health care to the State's Medicaid/TennCare recipients. However, Department of Health, TennCare Bureau will not exclude Walgreen from participation in the Medicaid/TennCare program based upon the facts in the State's Petition which arose or existed prior to entry of this Assurance unless required to do so by the United States Department of Health and Human Services. Walgreen does not waive any defense it may have to a claim that may be asserted against it by a private insure or similar entity such as a MCO or BHO.

8.17 Notwithstanding any term of this Assurance, specifically reserved and excluded from the scope and terms of this Assurance as to any entity or person (including Walgreen) are any and all of the following:

(A) Any criminal liability;

(B) Any liability to the State of Tennessee (or its agencies) for any conduct other than the conduct described in the State's Petition;

(C) Any claims based upon such obligations as are created by this Assurance;

(D) Any potential criminal, civil or administrative claims arising under federal or state tax, individual licensing, certificate of need or similar state regulatory proceedings other than Medicaid (or Medicaid/TennCare) recoupment; and

(E) Any private right of action which a person could commence against Walgreen.

8.18 Walgreen has provided the Attorney General's office with a copy of the Corporate Integrity Agreement between the Office of the Inspector General of the Department of Health and Human

Services and Walgreen Co. dated September 14, 1999 ("CIA") which includes section III providing how Walgreen will handle partially filled prescriptions. The Attorney General states that assuming Walgreen's practices fully conform with that CIA as it relates to partially filled prescriptions, Walgreen will be in compliance with paragraph 3.2 of this Assurance as it relates to partially filing prescriptions and adjudication of such prescriptions.

8.19 Walgreen waives its right to appear at any hearing to approve this Assurance. Walgreen specifically agrees that the State may obtain approval of this Assurance and the accompanying Agreed Order in an *ex parte* hearing. Walgreen agrees to execute an Agreed Order to accompany the Assurance.

IX. COMPLIANCE WITH ALL LAWS, REGULATIONS AND RULES

9.1. Nothing in this Assurance shall be construed as relieving Walgreen of the obligation to comply with all state or federal laws, regulations or rules.

X. APPLICABILITY OF ASSURANCE TO WALGREEN

10.1 The duties, responsibilities, burdens and obligations undertaken by Walgreen in connection with this Assurance shall apply to Walgreen Co.

10.2 As provided in paragraph 3.2, Walgreen agrees to provide notice to all pharmacists working in the State of Tennessee of the injunctive provisions of this Assurance or a summary thereof. As permitted by state law, any person having notice of an injunction who violates that injunction shall be subject to the jurisdiction of this court where the injunction is entered and subject to all remedies and penalties available at law.

XI. NOTIFICATION TO STATE

11.1 Any notices required by this Assurance shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State:

Michael K. Bassham
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL
Antitrust Division
425 Fifth Avenue North, 2nd Floor
Nashville, Tennessee 37243

For the Respondents:

Allan Resnick
Vice President - Law
Law Department
WALGREEN CO.
200 Wilmot Road
Deerfield, Illinois 60015
or Walgreen's registered agent with the
State of Tennessee

11.2 For five (5) years following execution of this Assurance, Walgreen shall notify the Office of the Attorney General, in writing, at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Walgreen's status that may effect compliance with obligations arising out of this Assurance.

XII. COURT COSTS

12.1 All court costs associated with the filing and distribution of this Assurance and the Agreed Order shall be borne by Walgreen. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116. Further, no discretionary costs shall be taxed to the State.